UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

DEREK L. DIGGETT	:	
	:	
v.	:	C.A. No. 16-233M
	:	
NANCY A. BERRYHILL,[1] Acting Commissioner of the Social Security Administration	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under the Social Security Act (the "Act"), 42 U.S.C. § 405(g). Plaintiff filed his Complaint on May 24, 2016 seeking to reverse the decision of the Commissioner. On January 9, 2017, Plaintiff filed a Motion for Reversal of the Disability Determination of the Commissioner. (Document No. 10). On April 4, 2017, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (Document No. 14). On April 26, 2017, Plaintiff filed a Reply Brief. (Document No. 16).

This matter has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); LR Cv 72. Based upon my review of the record, the parties' submissions and independent research, I find that there is substantial evidence in this record to support the Commissioner's decision and findings that Plaintiff is not disabled within the meaning

[1] Nancy A. Berryhill is now the Acting Commissioner of Social Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill has been substituted for Acting Commissioner Carolyn W. Colvin as Defendant in this action.

of the Act. Consequently, I recommend that Plaintiff's Motion for Reversal (Document No. 10) be DENIED and that the Commissioner's Motion to Affirm (Document No. 14) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed applications for DIB (Tr. 195-196) and SSI on (Tr. 197-205) on June 21, 2013 alleging disability since October 1, 2011. The applications were denied initially on October 10, 2013 (Tr. 145-147, 148-150) and on reconsideration on March 26, 2014. (Tr. 117-129, 131-143). Plaintiff's date last insured is March 31, 2013. Plaintiff requested an Administrative Hearing. On February 11, 2015, a hearing was held before Administrative Law Judge Donald Cole (the "ALJ") at which time Plaintiff, represented by counsel, and a vocational expert ("VE") appeared and testified. (Tr. 34-77). The ALJ issued an unfavorable decision to Plaintiff on March 6, 2015. (Tr. 81-90). The Appeals Council denied Plaintiff's request for review on March 22, 2016. (Tr. 1-3). Therefore the ALJ's decision became final. A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff argues that the ALJ failed to properly evaluate the evidence of record and to properly consider the effect of his obesity on his ability to sustain full-time, competitive employment.

The Commissioner disputes Plaintiff's claims and contends that the ALJ properly considered both the evidence of record and the effect of Plaintiff's obesity on his RFC.

III. THE STANDARD OF REVIEW

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – i.e., the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence

as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Where the Commissioner's decision is supported by substantial evidence, the court must affirm, even if the court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991). The court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. Frustaglia v. Sec'y of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

The court must reverse the ALJ's decision on plenary review, however, if the ALJ applies incorrect law, or if the ALJ fails to provide the court with sufficient reasoning to determine that he or she properly applied the law. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and the evidence establishes without any doubt that the claimant was disabled. Seavey v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) citing, Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985).

The court may remand a case to the Commissioner for a rehearing under sentence four of 42 U.S.C. § 405(g); under sentence six of 42 U.S.C. § 405(g); or under both sentences. Seavey, 276 F.3d at 8. To remand under sentence four, the court must either find that the Commissioner's decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Id.; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980)

(remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled).

Where the court cannot discern the basis for the Commissioner's decision, a sentence-four remand may be appropriate to allow her to explain the basis for her decision. Freeman v. Barnhart, 274 F.3d 606, 609-610 (1st Cir. 2001). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a sentence four remand, the court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

In contrast, sentence six of 42 U.S.C. § 405(g) provides:

> The court...may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;

42 U.S.C. § 405(g). To remand under sentence six, the claimant must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure to submit the evidence at the administrative level. See Jackson v. Chater, 99 F.3d 1086, 1090-1092 (11th Cir. 1996).

A sentence six remand may be warranted, even in the absence of an error by the Commissioner, if new, material evidence becomes available to the claimant. Id. With a sentence six remand, the parties must return to the court after remand to file modified findings of fact. Id.

The court retains jurisdiction pending remand, and does not enter a final judgment until after the completion of remand proceedings. Id.

IV. THE LAW

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 416(i), 423(d)(1); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do her previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-404.1511.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there is good cause to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(d). If a treating physician's opinion on the nature and severity of a claimant's impairments, is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. 20 C.F.R. § 404.1527(d)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly conclusory. See Keating v. Sec'y of Health and Human Servs., 848 F.2d 271, 275-276 (1st Cir. 1988).

Where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986). When a

treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship; (3) the medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R § 404.1527©. However, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. § 404.1527(c)(2).

The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. § 404.1527(e). The ALJ is not required to give any special significance to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's residual functional capacity (see 20 C.F.R. §§ 404.1545 and 404.1546), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(e). See also Dudley v. Sec'y of Health and Human Servs., 816 F.2d 792, 794 (1st Cir. 1987).

B. Developing the Record

The ALJ has a duty to fully and fairly develop the record. Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). The Commissioner also has a duty to notify a claimant of the statutory right to retained counsel at the social security hearing, and to solicit a knowing and voluntary waiver of that right if counsel is not retained. See 42 U.S.C. § 406; Evangelista v. Sec'y of Health and Human Servs., 826 F.2d 136, 142 (1st Cir. 1987). The obligation to fully and fairly develop the record exists

if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Id. However, where an unrepresented claimant has not waived the right to retained counsel, the ALJ's obligation to develop a full and fair record rises to a special duty. See Heggarty, 947 F.2d at 997, citing Currier v. Sec'y of Health Educ. and Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 416.917; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir. 1986). In fulfilling his duty to conduct a full and fair inquiry, the ALJ is not required to order a consultative examination unless the record establishes that such an examination is necessary to enable the ALJ to render an informed decision. Carrillo Marin v. Sec'y of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985).

D. The Five-step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, she is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments which significantly limit her physical or mental ability to do basic work activities, then she does not have a severe impairment and is not disabled. 20 C.F.R. § 404.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, she is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do not prevent her from doing past relevant work, she is not disabled. 20 C.F.R. § 404.1520(e). Fifth,

if a claimant's impairments (considering her residual functional capacity, age, education, and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). Significantly, the claimant bears the burden of proof at steps one through four, but the Commissioner bears the burden at step five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five-step process applies to both SSDI and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments, and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant bears the ultimate burden of proving the existence of a disability as defined by the Social Security Act. Seavey, 276 F.3d at 5. The claimant must prove disability on or before the last day of her insured status for the purposes of disability benefits. Deblois v. Sec'y of Health and Human Servs., 686 F.2d 76 (1st Cir. 1982), 42 U.S.C. §§ 416(i)(3), 423(a),(c). If a claimant becomes disabled after she has lost insured status, her claim for disability benefits must be denied despite her disability. Id.

E. Other Work

Once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. Seavey, 276 F.3d at 5. In determining whether the Commissioner has met this burden, the ALJ must develop a full record regarding the vocational opportunities available to a

claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989). This burden may sometimes be met through exclusive reliance on the Medical-Vocational Guidelines (the "grids"). Seavey, 276 F.3d at 5. Exclusive reliance on the "grids" is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id.; see also Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983) (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual's ability to meet job strength requirements).

Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given residual functional level or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the Commissioner's burden can be met only through the use of a vocational expert. Heggarty, 947 F.2d at 996. It is only when the claimant can clearly do unlimited types of work at a given residual functional level that it is unnecessary to call a vocational expert to establish whether the claimant can perform work which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.

1. Pain

"Pain can constitute a significant non-exertional impairment." Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment which could reasonably be expected to produce the pain or symptoms alleged. 42

U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

> (1) The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
>
> (2) Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
>
> (3) Type, dosage, effectiveness, and adverse side-effects of any pain medication;
>
> (4) Treatment, other than medication, for relief of pain;
>
> (5) Functional restrictions; and
>
> (6) The claimant's daily activities.

Avery v. Sec'y of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

2. Credibility

Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. Rohrberg, 26 F. Supp. 2d at 309. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829 F.2d at 195. The failure to articulate the reasons for discrediting subjective pain testimony requires

that the testimony be accepted as true. See DaRosa v. Sec'y of Health and Human Servs., 803 F.2d 24 (1st Cir. 1986).

A lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence and a credibility determination is, therefore, critical to the decision, "the ALJ must either explicitly discredit such testimony or the implication must be so clear as to amount to a specific credibility finding." Foote v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

V. APPLICATION AND ANALYSIS

A. The ALJ's Decision

The ALJ decided this case adverse to Plaintiff at Step 5. At Step 2, the ALJ determined that Plaintiff's COPD, obesity, anxiety, depression and learning disorder are "severe" impairments as defined in 20 C.F.R. §§ 404.1520(c) and 416.920(c). (Tr. 16). However, at Step 3, the ALJ did not find that any of these impairments met or medically equaled any of the Listings. (Tr. 18). As to RFC, the ALJ found that Plaintiff could perform a limited range of unskilled, light work. (Tr. 20). At Step 4, the ALJ concluded that Plaintiff's RFC precluded him from performing his past relevant work as a fast food worker. (Tr. 24). Finally, considering Plaintiff's RFC and the VE's expert testimony, the ALJ found at Step 5 that Plaintiff was capable of making a successful adjustment to other light, unskilled work and thus was not disabled as defined in the Social Security Act. (Tr. 25).

B. Plaintiff Has Shown No Error in the ALJ's RFC Finding

It is undisputed that, in assessing Plaintiff's RFC for a limited range of light work, the ALJ gave "greatest weight" to the opinions of the reviewing physicians – Dr. Georgy and Dr. Nanian.

(Tr. 22). The ALJ adopted their physical RFC assessments with one exception – he did not accept Dr. Nanian's conclusion that Plaintiff had a slightly greater lifting capacity than Dr. Georgy opined. (See Tr. 20, 97, 138). In rendering their opinions on December 9, 2013, and March 26, 2014 respectively, Dr. Georgy and Dr. Nanian each recognized that Plaintiff was morbidly obese with a BMI of 52.8. (Tr. 98, 139). In addition, both of them reviewed the report of Dr. Palumbo who examined Plaintiff on October 9, 2013. (Exh. 37F). Dr. Palumbo described Plaintiff as morbidly obese with a height of seventy-three inches and a weight of 400 pounds. (Tr. 338). However, although Plaintiff complained of asthma and knee/back pain, he reported to Dr. Palumbo being able to lift and carry twenty pounds, to walk about a mile before requiring rest, to walk without a cane or any other assistive device, and denied any hospitalization or attention for an acute asthmatic exacerbation. Id. On examination, Dr. Palumbo found that Plaintiff was in no apparent distress, was able to walk into exam room and maneuver onto table without any difficulty or assistance, and able to get undressed and dressed without any help. Id. Dr. Palumbo reported that Plaintiff's back exam was unremarkable, his gait was within normal limits, his knee exam was unremarkable other than mild crepitus, and he had some "trace" bilateral edema in his feet and ankles, most likely related to his morbid obesity. (Tr. 339). After reviewing Dr. Palumbo's report and the other medical evidence of record at the time, both Dr. Georgy and Dr. Nanian concluded that Plaintiff could perform work at the RFC adopted by the ALJ. In addition, the ALJ reasonably concluded that Dr. Palumbo's "essentially normal physical evaluation undermines [Plaintiff's] allegations of disabling symptoms." (Tr. 21).

Plaintiff argues that the ALJ could not lawfully rely upon the opinions of Dr. Georgy and Dr. Nanian because (1) they were rendered prior to a "substantial" change in Plaintiff's condition; (2)

they failed to properly follow SSR 02-1p; and (3) they contain "internally irreconcilable contradictions." (Document No. 16 at p. 2).

First, as to SSR 02-1p (Evaluation of Obesity), Plaintiff has shown no violation of this policy interpretation ruling. The ALJ found that Plaintiff's obesity was a severe impairment at Step 2 along with his COPD, anxiety, depression and learning disorder. (Tr. 16). The ALJ noted and considered Plaintiff's claim that he cannot work because of obesity and depression due to morbid obesity. (Tr. 20). The record is clear that the ALJ, the reviewing physicians and the examining physician, were all aware that Plaintiff's obesity was in the Level III "extreme" category, i.e., BMI of 40 or greater. However, SSR 02-1p makes clear that Level III obesity does "not correlate with any specific degree of functional loss." SSR 02-1p is intended to "remind" adjudicators to "consider" the effects of obesity when evaluating disability and that the combined effects of obesity with other impairments may be greater than might be expected without obesity. While Plaintiff clearly disagrees with the conclusions reached by the ALJ and the opinions rendered by the consulting and examining sources, the record is clear that the ALJ and the sources were aware of Plaintiff's morbid obesity and appropriately considered its effects as directed by SSR 02-1p.

Second, as to Plaintiff's claim that there was a "substantial" change in his condition between the time that Dr. Georgy and Dr. Nanian rendered their opinions and when the ALJ ruled, Plaintiff relies primarily upon a thirty-four pound weight gain[2] to 434 pounds and his evaluation for gastric

[2] While Dr. Nanian observed that Plaintiff's weight was 400 pounds when he rendered his opinion on March 26, 2014 (Tr. 136, 338), the record suggests fluctuations or inaccuracies. For instance, Dr. Sethi reported that Plaintiff's weight was 431pounds on June 26, 2014 (Tr. 432), and Dr. Al-Raqqad reported that Plaintiff's weight was 347 pounds on April 30, 2014. (Tr. 406). In addition, Plaintiff's reliance upon this Court's decision in Riley v. Astrue, C.A. No. 10-445S (D.R.I. Sept. 30, 2011), is misplaced. Unlike this case, the claimant in Riley experienced a substantial 100 pound weight gain which increases his BMI from Level II to the Level III extreme obesity and, although the ALJ in that case described the weight gain as a potentially material change in circumstances, he did not address the issue in his decision. Here, the claimant's weight gain was more modest and his BMI was already Level III prior to the weight gain.

weight loss surgery. (Tr. 437-438). While these developments are undisputed, Plaintiff offers no medical evidence supporting the claim that his thirty-four pound weight gain resulted in sufficient changes in his functional capacity to invalidate the opinions of Dr. Georgy and Dr. Nanian. Furthermore, the ALJ specifically found that evidence admitted after the state disability review did not establish that Plaintiff's condition had worsened or that he had additional limitations. (Tr. 22). Plaintiff argues that the ALJ makes "no reference to the fact that [Plaintiff] had been referred to get gastric weight loss surgery." (Document No. 10-1 at p. 17). Plaintiff's argument is unsupported. The ALJ specifically references Plaintiff's "plan to undergo gastric bypass surgery" in his decision (Tr. 17) and the surgery was the subject of testimony and discussion between the ALJ and Plaintiff's counsel during the hearing. (See, e.g., Tr. 46-47). Dr. Pohl's January 29, 2015 letter regarding Plaintiff's evaluation for gastric weight loss surgery does not contain any medical information as to Plaintiff's functional limitations or the claimed deterioration of his condition. (Tr. 437-438). In fact, Plaintiff's counsel conceded at the hearing that it was not "a very elucidating exhibit." (Tr. 46). The exhibit does set a weight reduction goal of 400 pounds as part of the surgery "work-up" (Tr. 437-438) and SSR 02-1p recognizes that physicians "generally recommend" surgery when obesity reaches Level III. The bottom line is that Plaintiff has pointed to no competent medical evidence showing that his condition substantially changed between March 2014 and March 2015 so as to invalidate the opinions of Dr. Georgy and Dr. Nanian.

Finally, Plaintiff argues that the RFC opinions of Dr. Georgy and Dr. Nanian contain internal contradictions and are thus unreliable. Plaintiff questions how he could be limited to light work

---

In addition, the ALJ found that evidence admitted after the state disability review did not establish that Plaintiff's condition had worsened or that he had additional limitations. (Tr. 22).

capable of lifting up to twenty-five pounds only occasionally and twenty pounds frequently but still be able, at 400 pounds, to frequently climb ladders, ropes or scaffolds. While Plaintiff argues that there is "no way to fairly reconcile" those aspects of the medical RFC opinions, he offers no evidence or legal authority to support his argument. He also provides no authority to support his position that the ALJ and the reviewing physicians were required to explain this alleged conflict.[3] Thus, the argument is rejected. Furthermore, even if there was an arguable conflict, it resulted in no prejudice to Plaintiff at Step 5 since it is undisputed that the jobs identified by the VE did not require climbing. (See Document Nos. 10-1 at p. 24 and 14-1 at p. 16; Tr. 24-25, 71).

Ultimately, Plaintiff's challenge to the ALJ's evaluation of the medical opinion evidence inappropriately asks this Court to re-weigh the record evidence in a manner more favorable to him. See, e.g., Seavey v. Barnhart, 276 F.3d 1, 10 (1st Cir. 2001) (the ALJ is responsible for weighing the evidence and resolving conflicts in the evidence). The ALJ weighed conflicting evidence in this record, and Plaintiff has shown no error in his ultimate decision to favor the opinions of the reviewing physicians over the opinion of Dr. Al-Raqqad. Castro v. Barnhart, 198 F. Supp. 2d 47, 54 (D. Mass. 2002) (The ALJ "may reject a treating physician's opinion as controlling if it is inconsistent with other substantial evidence in the record, even if that evidence consists of reports from non-treating doctors."). "The ALJ's resolution of evidentiary conflicts must be upheld if supported by substantial evidence, even if contrary results might have been tenable also." Benetti v. Barnhart, 193 Fed. Appx. 6, 2006 WL 2555972 (1st Cir. Sept. 6, 2006) (per curiam) (citing Rodriguez Pagan v. Sec'y of HHS, 819 F.2d 1 (1st Cir. 1987)). In other words, the issue presented

[3] Plaintiff's counsel did not bring this claimed conflict to the attention of the ALJ in either his opening or closing arguments at the hearing, or when cross-examining the VE after the ALJ posed a hypothetical including these allegedly contradictory functional limitations.

is not whether this Court would have found Plaintiff's impairments to be disabling but whether the record contains sufficient support for the ALJ's non-disability finding. Since Plaintiff has shown no error in the ALJ's evaluation of the medical opinions and other evidence of record, there is no basis for reversal and remand of this disability benefits denial.[4]

C. Plaintiff Has Shown No Error in the ALJ's Consideration of the Learn To Earn Employment Program Report

From September 8, 2014 through October 3, 2014, Plaintiff participated in the Learn to Earn Employment Program ("LEEP") administered by Goodwill Industries for the State of Rhode Island Office of Rehabilitation Services. The record includes both midterm and final progress reports. (Exh. B13F). Plaintiff's overall performance was "acceptable," although he was late or absent for 50% of the classes. (Tr. 416). He was only in attendance for 70 of the 100 hours of class time. (Tr. 415).

Plaintiff's counsel argues that the LEEP report establishes that Plaintiff was "unable to sustain the attendance necessary for sustained ongoing employment due to his physical and mental impairments." (Document No. 10-1 at p. 28). Although the ALJ acknowledged Plaintiff's poor attendance record, he concluded that "that fact alone does not establish the reason why he missed those sessions – it may well have nothing to do with his physical or mental impairments." (Tr. 23). Plaintiff contends that this is improper speculation.

While the LEEP report indicates that Plaintiff attributed his absences to "scheduled and emergency doctor appointments and sickness," the ALJ accurately and reasonably notes that such

---

[4] Plaintiff also argues that the ALJ erred by failing to call a Medical Expert ("ME") to testify as to the effect of Plaintiff's obesity on his ability to function. The decision as to whether to obtain ME testimony is discretionary, see Rodriguez-Pagan v. Sec'y at HHS, 819 F.2d 1, 5 (1st Cir. 1987), and Plaintiff has shown no abuse of discretion. As discussed, the ALJ had the discretion under these circumstances to adopt the RFC opinions of Dr. Georgy and Dr. Nanian given the lack of any evidence of a material worsening of Plaintiff's condition thereafter.

was "not corroborated by or correlated to the medical record." (Tr. 23). In addition, the LEEP report indicates that Plaintiff's doctor "would not give him a medical excuse to withdraw from the class." (Tr. 415). The LEEP report does evidence Plaintiff's poor attendance and reasonably states that it would not be acceptable on a job. However, the LEEP report does not offer any substantiated conclusion as to the reasons for Plaintiff's absences and tardiness other than his own statements. The LEEP report does not indicate that Plaintiff submitted any medical notes excusing his absences or lateness, and Plaintiff does not presently point to any such evidence in the record. Plaintiff argues that the LEEP program "agreed" that Plaintiff has "limitations" that made him unable to participate sufficiently to sustain full-time work at that time. (Document No. 10-1 at p. 29). To read that from the LEEP report is itself a leap. As noted, the LEEP report clearly indicates that Plaintiff needed to improve his attendance and punctuality but it does not, as reasonably interpreted by the ALJ, establish the reason(s) why his attendance and punctuality were so poor. Accordingly, the Court finds no error in the ALJ's evaluation of the LEEP report.[5]

VI. CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff's Motion for Reversal (Document No. 10) be DENIED and that Defendant's Motion to Affirm (Document No. 14) be GRANTED. Further, I recommend that Final Judgment enter in favor of Defendant.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72.

[5] Plaintiff also challenges the ALJ's credibility determination and contends that "he employed the wrong burden of proof." (Document No. 10-1 at p. 31). The ALJ's finding that Plaintiff's allegations regarding his limitations are "not entirely credible" (Tr. 20) does not suggest that he required them to be "entirely credible" to be given any credit as argued. Plaintiff has shown no legal error in the ALJ's evaluation of his credibility.

Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
May 9, 2017